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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1978
No. 78-890

ALVIN GERSON LEVITT and
JAMES JOSEPH RILEY,

Petitioners,

vs.

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY TO GOVERNMENT'S BRIEF IN OPPOSITION TO CERTIORARI

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TOPICAL INDEX

	Page
PETITIONER'S REPLY TO GOVERNMENT'S BRIEF IN OPPOSITION TO CERTIORARI	1
CONCLUSION	6

TABLE OF AUTHORITIES

Cases

Franks v. Delaware, #77-5176, June 26, 1978	2, 3, 5
Kalustian v. United States, 529 F.2d 585 (9th Cir. 1975)	3
Spagnuolo v. United States, 549 F.2d 705 (9th Cir. 1977)	3

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This reply is made to the government's brief in opposition to petitioner's request for a grant of certiorari. The opinion below, jurisdictional statement and statement of issues is found in petitioner's petition for certiorari filed earlier.

The respondent United States alleges (Respondent Brief page 4) that petitioner herein has misplaced reliance on Franks v. Delaware, #77-5176, June 26, 1978 in that petitioner has failed to present facts suggesting that an alleged omission was the result of deliberate falsehood or reckless disregard of the truth; and that petitioner has not demonstrated the omission was truly material since petitioner did not show that disclosure of the informant Millikan as a source would have led the District Judge to refuse to issue the wire communication intercept order.

If the affiant cannot be questioned, respondent is correct in stating petitioner failed to present facts showing deliberate falsehood or reckless disregard of the truth. It would appear however, that once petitioner made an offer of proof of the omission of a material fact, as here, an opportunity to inquire of the affiant would have taken no great amount of trial time. The affiant either knew the informant and the nature of his information or he did not, and the court could determine for itself whether the omission was material, deliberate or otherwise.

All that petitioner states is that he should have been afforded the opportunity to at least question the affiant regarding the matter. This was not a fishing expedition to learn the identity of a secret informant. It was an allegation that a source close to the petitioner who had all the information the government might need to make its case without a wire-tap, was providing said information to the government.

Clearly, both tests of Franks were met.

It is submitted that petitioner's offer of proof and the response of the government thereto at the time of trial reflected that Millikan was an informant for the government and that he was supplying information or evidence that would provide all of the jurisdictional elements. At least petitioner should have been afforded the opportunity to so establish.

It should be pointed out that defendants in this and other wiretap cases have, among other things, urged that the government's numerous applications for wiretap authorization fail to show that normal investigative techniques have been tried and/or why they are not likely to succeed or otherwise establish necessity for the tap.

The government, in its efforts to persuade the court of the "necessity" for the wiretap points to all its "failures" (sometimes in conclusory language, sometimes not) witness Kalustian v. United States (529 F.2d 585 (9th Cir. 1975)); Spagnuolo v. United States (549 F.2d 705, 709-710 (9th Cir. 1977)).

The government often alleges that the informers (who apparently quite frequently in these affidavits have more than enough information to warrant indictment and conviction) refuse to testify even if immunized and given protective custody. This allegation is made with such regularity that it appears to be a boiler plate recitation.

Defendants have no means of determining the truth of these allegations much less the identity of these informants. This allegation (re refusal to

testify) must of necessity go unchallenged since no means to compel proof thereof exists. Since one cannot question the affiant agent on the issue, the likelihood of confirming this fact through the informant evaporates.

Where the factual showing of "necessity" for the tap is marginal, or challenged, the issue of other sources of evidence looms large in what is now a "probable cause" equation.

"Necessity" for a wiretap would appear to be the equivalent of a showing of probable cause for a search warrant, although in addition thereto and statutorily required.

Where as here, the defendant does at least learn the identity of an informant, and in an offer of proof alleges that this source is privy to all the information and evidence required to provide the government with a case against petitioner and his organization, it would appear that he should be afforded the opportunity to make that showing.

If in fact Millikan is an informant for the FBI (which fact appears to be conceded by counsel for the government at trial) then his whereabouts are more peculiarly in the knowledge of the government than the defendant. At the very least, petitioner should have been afforded the opportunity of questioning the affiant concerning the nature of the information received from this source so that conceivably the government's own agents may have supplied information akin to Brady material. This would have also afforded this defendant the unique opportunity of testing the government's alleged

boiler plate recitation that the informants all refused to testify even if immunized because they feared for their safety.

While petitioner's offer of proof at trial appeared to be inartfully drawn, it was made without benefit of this court's opinion in Franks and in the course of argument before a judge and court that, albeit respectfully, injected comment and posed questions that drew counsel away from the full effect of his offer (as a reading of the trial transcript would reflect).

Clearly, from the record, the offer of proof was sufficient to show that the proferred source could not only connect petitioner to the operation, but that his position of "back office" clerk would enable him to establish the number and names of associates (5 or more) and that it remained in continuous operation in excess of 30 days and had a gross revenue in excess of $2,000 in a single day during this period, i.e., the jurisdiction and elements of the crime charged.

CONCLUSION

It is respectfully submitted that for the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

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